

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
VS. : CRIMINAL NO. 11-577  
VINCENT JOSEPH DEMSKY :

ORDER

AND NOW, this                      day of                      , 2012, upon  
consideration of the Defendant's Motion to Dismiss the  
Information for Outrageous Government Conduct, it is hereby  
ORDERED that the Motion is Granted with prejudice against the  
Government.

BY THE COURT:

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THE HONORABLE TIMOTHY R. RICE      J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
VS. : CRIMINAL NO. 11-577  
VINCENT JOSEPH DEMSKY :

MOTION TO DISMISS THE INFORMATION  
FOR OUTRAGEOUS GOVERNMENT CONDUCT  
PURSUANT TO FEDERAL RULE OF CRIMINAL  
PROCEDURE 12(b).

The Defendant, VINCENT JOSEPH DEMSKY, by his Attorney, JAMES A. LAMMENDOLA, ESQ., respectfully moves, pursuant to Fed.R.Crim.P. 12(b), for the Dismissal of the Information for Outrageous Government Conduct filed against him as of record on September 28, 2011, and in support thereof, represents:

1.) On September 28, 2011, an Information was filed against the Defendant charging the Defendant with one count of attempted possession of two Oxycontin 80mg tablets, each of which is a mixture and substance containing a detectable amount of oxycodone, a Schedule II controlled substance, in violation of Title 212, United States Code, Section 844 and Section 846.

2.) On September 22, 2011, the Government initiated a reverse "sting" operation at the Boeing facility located in

Ridley Park, Pennsylvania.

3.) On September 22, 2011, the Defendant was approached by a Government informant who offered to sell the Defendant two 80 mg. Oxycontin tablets.

4.) It was the Government informant who initiated the attempted purchase by the Defendant such that the Defendant was induced to commit the crime by the Government informant.

5.) The Defendant was an employee of Boeing in good standing for approximately four years at the time of this incident.

6.) The Defendant, at the time, suffered multi-level chronic discogenic disease, as well as multi-level foraminal stenosis. Medical records of the Defendant also reveal that he had chronic opiate dependent low-back and leg pain syndrome, secondary to lumbar spondylolysis, facet arthropathy, lumbar degenerative disc disease, with probable chronic subacute radiculopathy, and possible internal disc disruption. See Dr. Herbert Avart's report dated September 24, 2011, attached hereto and marked Exhibit A.

7.) As part of the Defendant's back pain regimen, the Defendant was prescribed 40 mg. Oxycontin tablets on a regular basis and, on the date of the incident, the Defendant had a prescription for Oxycontin tablets which had been filled. See copies of the prescription from Dr. Avart and the CVS Pharmacy prescription label, which are attached hereto and marked collectively Exhibit B.

Ridley Park, Pennsylvania.

3.) On September 22, 2011, the Defendant was approached by a Government informant who offered to sell the Defendant two 80 mg. Oxycontin tablets.

4.) It was the Government informant who initiated the attempted purchase by the Defendant such that the Defendant was induced to commit the crime by the Government informant.

5.) The Defendant was an employee of Boeing in good standing for approximately four years at the time of this incident.

6.) The Defendant, at the time, suffered multi-level chronic discogenic disease, as well as multi-level foraminal stenosis. Medical records of the Defendant also reveal that he had chronic opiate dependent low-back and leg pain syndrome, secondary to lumbar spondylolysis, facet arthropathy, lumbar degenerative disc disease, with probable chronic subacute radiculopathy, and possible internal disc disruption. See Dr. Herbert Avart's report dated September 24, 2011, attached hereto and marked Exhibit A.

7.) As part of the Defendant's back pain regimen, the Defendant was prescribed 40 mg. Oxycontin tablets on a regular basis and, on the date of the incident, the Defendant had a prescription for Oxycontin tablets which had been filled. See copies of the prescription from Dr. Avart and the CVS Pharmacy prescription label, which are attached hereto and marked collectively Exhibit B.

8.) Defense counsel received the Defendant's medical records approximately two weeks ago after the deadline set by the Court of February 3, 2012 for the filing of pre-trial motions.

9.) The Government's conduct was excessive in its involvement in the creation of the crime and comprised significant Government coercion to induce the commission of the crime particularly in view of the Defendant's opiate addiction as a result of his medical problems. See United States v. Garcia, 411 F.3d 1173, 1181 (10<sup>th</sup> Cir. 2005).

10.) Prosecutions are prohibited based upon Government conduct that violates concepts of "fundamental fairness," or that shocks the "universal sense of justice," mandated by the due process clause of the Federal Constitution. See United States v. Russell, 411 U.S. 423, 431-32 (1973).

WHEREFORE, the Defendant respectfully prays that this Honorable Court dismiss the Government's information against the Defendant.

Respectfully submitted,

  
JAMES A. LAMMENDOLA, ESQ.  
ATTORNEY FOR DEFENDANT

(JAM3125-Validated Signature Code)

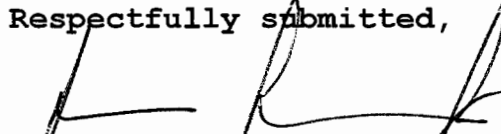
UNITED STATES OF AMERICA :  
VS. : CRIMINAL NO. 11-577  
VINCENT JOSEPH DEMSKY :

The Government's conduct was excessive in its creation of the crime and in its inducement of the crime in view of the Defendant's opiate addiction because of his medical problems. See United States v. Garcia, 411 F.3d 1173, 1181 (10<sup>th</sup> Cir. 2005). Moreover, the Government's conduct was tantamount to psychological abuse of the Defendant based upon the Defendant's addiction. The Third Circuit Court of Appeals recognizes the claim of dismissal of an information or indictment for outrageous Government conduct. See United States v. Pitt, 193 F.3d 751, 760 (3d Cir. 1999); United States v. West, 511 F.2d 1083 (3d Cir.

1975). See also United States v. Twigg, 588 F.2d 373 (3d. Cir. 1978), where the Third Circuit Court of Appeals dismissed an indictment because the Government created, staffed, directed, and implemented the criminal activity, as in the instant case.

The Government's conduct violated concepts of "fundamental fairness," as mandated by the due process clause of the U.S. Constitution. See United States v. Russell, 411 U.S. 423, 431-32 (1973), such that it warrants the dismissal of the information against the Defendant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. A. Lammendola', is written over a horizontal line.

JAMES A. LAMMENDOLA, ESQ.  
ATTORNEY FOR DEFENDANT

(JAM3125-Validated Signature Code)

**EXHIBIT A.**



REHAB PHYSICIANS, INC.  
1999 Sproul Road, Suite 10  
Broomall, PA 19008  
(610) 356-6250  
(610) 353-2109 – fax

Patient Name: DEMSKY, VINCENT  
Date of service: 09/24/11

1. 338.4
2. 724.2
3. 724.4

**HISTORY:**

A 47-year-old male with chronic history of back and leg pains. Sitting and standing for long periods of time and exercise increase complaints. Works as a metal fabricator at Boeing. Lives in an apartment by himself and works third shift. Has been on a number of different opioid analgesia including oxycodone/apap and Naprosyn but developed dyspepsia. Followed by Doctor Kevin Connor, internal medicine Associates, his complaints primarily axial. No new weakness or pain increases with urination or defecation.

**Allergies:** Penicillin.

**REVIEW OF SYSTEMS:** Constitutional: Usual height: 5'8". Usual weight: 230 pounds. Positive for fatigue and weight change. Neurologic: Dysesthesia, intermittently, both legs. GI: Negative. Musculoskeletal: Arthralgia and myalgia iliolumbar spine.

Prior lumbar MRI without contrast completed on August 16, 2009, demonstrated L4-L5 disc desiccation with bilateral subarticular recess stenosis, right greater than left, with coexisting facet hypertrophy at L5-S1. There is mild concentric disc space narrowing. Hypertrophic osteophyte formation without significant central canal or subarticular recess stenosis, though there is bilateral facet hypertrophy at this level with moderate left foraminal stenosis. Prior lumbar MRI from February 20, 2006, demonstrated at L5-S1, diffuse disc bulge with bilateral facet hypertrophy and ligamentum flavum, infolding, causing moderate spinal canal stenosis.

**PHYSICAL EXAMINATION:**

**Vitals:** H: 66.5". W: 232 lb. BMI= 36.88kg/m<sup>2</sup>. BP: 134/76. P: 72. R: 12

**Mental Status:** Alert and oriented x3. CAGE questionnaire is negative. Minimal behavior.

**HEENT:** Pink conjunctiva.

**Chest:** Regular cardiac rate, rhythm and heart sounds. Clear breath sounds.

**Abdomen:** Soft with active bowel sounds.

**Extremities:** Pulses equal both lower extremities. There is myostatic contracture involving the hamstring, tensor fascia lata, quadriceps, and hip flexor musculature in both legs.

**Spine:** Positive bilateral sustained voluntary hip flexion test and positive sacral apex pressure test. Decreased lumbar range of motion, positive PA glides L4-5 & L5-S1 vertebral segments. Active spinal motion in flexion, extension, side bending and rotation (percent of normal): Cervical is 80-85%, thoracic 75-80% and lumbar is 70-75%.

**Neurologic:** Negative sitting root and straight leg raising. There is fair bilateral hip flexion and adduction strength. Intact sharp/dull discrimination both legs. Ambulation is step over step on level surface. He is able to stand on his toes and heels respectively.

**Patient Name:** DEMSKY, VINCENT  
**Date of service:** 09/24/11

**IMPRESSION:** Chronic opiate dependent low back and leg pain syndrome secondary to lumbar spondylosis, facet arthropathy, lumbar degenerative disc disease with probable chronic subacute radiculopathy and possible internal disc disruption.

**PLAN:**

1. Signed pain management agreement stipulating one physician & one pharmacy involved in the prescription and dispensing of controlled medication.
2. OxyContin 30 mg, #42, one p.o. q.8 hour.
3. Electrode electrophysiologic evaluation of the lumbar spine and both legs.
4. Calorie-restricted weight loss using Mediterranean diet or Weight Watchers as clinically appropriate. Reviewed importance of weight loss on chronic low back pain.
5. Counseled regarding tolerance, dependency, withdrawal, drug-driving and taking medication as directed.
6. Obtain lumbar MRI.

---

Herbert N. Avart, D.O.  
Signed electrically  
HNA/nbb/rme/jlu

REHAB PHYSICIANS, INC  
1999 Sprout Road, Suite 10  
Broomall, PA 19008  
(610) 356-6250  
(610) 353-2109 - fax

Patient Name:

Vincent Donsky

Date of service:

9/22/11

HISTORY/REASON FOR VISIT:

C/O LBP + muscle spasms  
Meds control symptoms & permit for  
Do not feel he can decrease strength  
Heel decreases muscle spasms. No ETOH

CURRENT MEDICATIONS:

OxyContin 40mg Q12  
Heel 10mg ~ 1/d

REVIEW OF SYSTEMS: Constitutional: Psychiatric: Negative. GU: Denies frequency, incontinence and dysuria. Hematologic: Denies easy bruising or bleeding tendencies. Neurologic: Decreasing balance skills. Musculoskeletal: Positive arthralgia and myalgia left neck. Cardiovascular: Mild dyspnea on exertion. No shortness of breath or pedal edema.

PHYSICAL EXAMINATION:

Vitals: W 228 lb. BP: 142/82 P: 72 O2sat 99% R: 12

Mental Status: Clear mental status and sensorium. Alert & oriented x3. Good and affect.

HEENT: Pupils are 3 millimeters bilaterally.

Spine: (+) BLVD (+) PA gels L45 L5S1 & L6ON

Abdomen: AOS

Extremities: MSC

Neurologic: S/Sx

IMPRESSION:

338.4/719.45/721.3

PLAN:

UDT (+) OX4 (Expected)  
FML papers completed  
Flu 1 month

Herbert M. Avram, D.O.  
HNA/rh/usa/ab

**EXHIBIT B.**

Rehabilitation Physicians Inc.

Herbert N Avart, D.O.

Physical Medicine & Rehabilitation

LIC #: OS004208L • DEA #: AA8919853 • NPI #: 1861446908

1999 Sproul Rd., #10

Broomall, PA 19008

Tel: 610 356 6250 • Fax: 610 353 2109

Name. *Vincent D. ...*

DOB *1/15/61*

Address. *...*

Date. *1/21/11*

**R**

REFILL NR 1 2 3 4 5

IN ORDER FOR A BRAND NAME PRODUCT TO BE DISPENSED, THE PRESCRIBER MUST HAND WRITE  
'BRAND NECESSARY' OR 'BRAND MEDICALLY NECESSARY' IN THE SPACE ABOVE.

D.O.

RX 2 PA H

FileRx.com 800-307-7717 R

Order # M52558-1

SCRIPT# 8467

Rehabilitation Physicians Inc.

Herbert N Avart, D.O.

Physical Medicine & Rehabilitation

LIC #: OS004208L • DEA #: AA8919853 • NPI #: 1861446908

1999 Sproul Rd., #10

Broomall, PA 19008

Tel: 610 356 6250 • Fax: 610 353 2109

Name. *Vincent D. ...*

DOB *1/15/61*

Address. *...*

Date. *1/21/11*

**R**

REFILL NR 1 2 3 4 5

IN ORDER FOR A BRAND NAME PRODUCT TO BE DISPENSED, THE PRESCRIBER MUST HAND WRITE  
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D.O.

FileRx.com 800-307-7717 RxPads.com

RX 2 PA H

Order # M52558-1

SCRIPT# 8468

**DE WAITING** PROMISED: 08:19a  
09/22/2011 09-22-2011  
# Scripts: 02

**CVS/pharmacy** #5462 Ph: 610.325-8422 CUSTOMER RECEIPT  
1981 SPROUL RD.  
BROOMALL, PA  
19008

**DEMSKY/DEMARCO, JOE**  
744 CHESTER PIKE, APT 12, RIDLEY PARK, PA 190780000  
Ph: 484.953-1006 DOB: 10-15  
Date: 09/22/2011 DAW: 0  
Rx: 0533965 00

**CYCLOBENZAPRINE 10 MG TABLET**  
MYLAN  
TAKE 1 TABLET BY MOUTH 3 TIMES A DAY AS NEEDED  
MUSCLE SPASMS  
INS: \$0.71

NDC: 00378-0751-10 Days Supply: 10 Refills: 1 Qty: 30 EA  
Prschr: HERBERT NEIL AVART  
TP: 4000  
AUTH#: 500100E GR: BOEING1  
PAID PRESCRIPTION Caps: Y

**DE WAITING** PROMISED: 08:17a  
09/22/2011 09-22-2011  
# Scripts: 02

**CVS/pharmacy** #5462 Ph: 610.325-8422 CUSTOMER RECEIPT  
1981 SPROUL RD.  
BROOMALL, PA  
19008

**DEMSKY/DEMARCO, JOE**  
744 CHESTER PIKE, APT 12, RIDLEY PARK, PA 190780000  
Ph: 484.953-1006 DOB: 10-15  
Date: 09/22/2011 DAW: 0  
Rx: N 0533964 00

**OXYCONTIN 40 MG TABLET**  
PURDUE PHARMA L  
TAKE 1 TABLET BY MOUTH EVERY 12 HOURS  
INS: \$392.21

NDC: 59011-0440-10 Days Supply: 30 Refills: 0 Qty: 60 EA  
Prschr: HERBERT NEIL AVART  
TP: 4000  
AUTH#: WDEQWXA GR: BOEING1  
PAID PRESCRIPTION Caps: Y

002320



**MEDICAL ALERT**  
**HELP**  
At the Push of a Button

**America's #1 Medical Alarm**

**\$29.95 / MONTH**

- No Other Costs
- No Long Term Contract

Recommended by:  
**Good Housekeeping**  
As Top-Rated Medical Alarm  
November 2005

**CVS/pharmacy**  
Call: 1-800-296-8888

002320



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November 2005

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002315

**Flu shots every day!**

- Many insurance plans accepted
- \$5 gift card\* if not covered by insurance
- No appointment necessary

**Ask your pharmacy team\*\*  
for a flu shot today!**

\* Restrictions apply. See gift card for details.  
\*\* Flu shots available when immunizing pharmacist is on duty.

**CVS/pharmacy**

002315

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**CVS/pharmacy**

"A"  
Exhibit

CERTIFICATE OF SERVICE

I, JAMES A. LAMMENDOLA, ESQ., Court-Appointed Counsel for the Defendant, hereby certify that I have served a copy of the attached Motion to Dismiss for Outrageous Government Conduct and Memorandum of Law in Support thereof, upon Assistant United States Attorney Faithe Moore Taylor, Esq., by first class U.S. mail to the Office of the U.S. Attorney, 615 Chestnut Street, 12<sup>th</sup> Floor, Philadelphia, Pennsylvania 19106.



JAMES A. LAMMENDOLA, ESQ.  
ATTORNEY FOR DEFENDANT

(JAM3125-Validated Signature Code)

DATE: \_\_\_\_\_

3/7/12